In re A. B. LTD.

[C. A. (Whitton, Buhagiar and Tan Ah Tah JJ.)
May 31, 1957]

[Singapore — Civil Appeal No. 13 of 1956]

Income Tax Ordinance (Cap. 166), ss. 10(1)(a), 14 & 81(2) — Appeal — Misconception of legal nature of transactions — Jurisdiction of Court over Board's conclusions — Review — Sale of rights of burial in cemeteries — Whether "trade" and whether revenue derived therefrom assessable — Deductions against revenues received — Whether allowed.

This was an appeal against the decision of the learned Chief Justice reported in (1956) M.L.J. 197 setting aside a decision of the Board of Review and restoring certain assessments of the Comptroller made in respect of the company. The points which arose on the appeal were: (i) whether the learned Chief Justice was right in interfering with the decision of the Board of Review established under the Income Tax Ordinance (Cap. 166);

[Section 81(2) of that Ordinance reads: "In any case in which the amount of the tax payable, as determined by the Board (excluding the amount of any costs awarded) exceeds two hundred dollars, the appellant or the Comptroller may appeal to the High Court from the decision of the Board upon any question of law or of mixed law and fact."];

(ii) whether the learned Chief Justice was right in reviewing and upsetting the decision of the Board;

(iii) whether the learned Chief Justice was right in holding that the transactions of the appellants amounted to "trade" and that the revenue derived from the grant of burial rights was assessable;

(iv) whether any deductions may be allowed against the revenue received from the grants of burial rights.

Held: (1) the reasoning of the Board in concluding that there was a sale of capital and assets was wrong. The Board's decision was not based on purely a question of fact, but on a misconception of the legal nature of the transactions of granting burial rights, therefore an appeal lies under section 81(2) of the Income Tax Ordinance;

(2) in the present case the Board misdirected themselves on the point of law, i.e., the legal nature of the transactions of granting burial rights. Their decision flows directly from this misdirection and from the finding that the appellants were realising their assets, the Court had therefore jurisdiction over the conclusions of the Board and could review the matter and draw the right conclusion from the primary facts as found by them;

(3) although questions may arise as to the deductions which are allowable in arriving at profits in aid of the rates and matters of that kind, there is no doubt at all that moneys received for the sale of rights of burial in cemeteries, either in perpetuity or for a limited period, are trade receipts and as such are assessable, subject to proper allowances, to income tax under the Income Tax Ordinance;

(4) as the law now stands there is no authority to make such deductions. The principles in **Edinburgh** case(6) are applicable and no deduction can be made in respect of cost of land used as grave spaces.

The decision of the High Court reported in (1956) M.L.J. 197 affirmed.

Cases referred to:—

(1) *Edwards v. Bairstow* 36 T.C. 207; (1956) A.C. 14; (1955) 3 All E.R 48.

(2) *R. v. Inhabitants of St. Mary Abbot's Kensington* 12 Ad. & E. 824.

(3) *Cooksey & Bibby v. Rednall* 30 T.C. 514.

(4) *Harvey v. Caulcott* 33 T.C. 159.

(5) *Tebrau (Johore) Rubber Syndicate Ltd. v. Farmer* 5 T.C. 658.

(6) *Edinburgh Southern Cemetery Co. v Kinmont* 2 T.C. 516.

(7) *Portobello Town Council v. Sulley* 2 T.C. 647.

(8) *Paddington Burial Board v. Commissioners of Inland Revenue* 2 T.C. 46.

(9) *Smith Berry v. Cordy* 28 T.C. 250.

(10) *Cayzer Irvine & Co. v. C.I.R.* 24 T.C. 491.

(11) *Thew v. South West Africa Co. Ltd.* 9 T.C. 141.

(12) *Erichsen v. Last* (1881) 8 Q.B.D. 414.

(13) *British South Africa Co. v. Commissioner of Income Tax* (1946) A.C. 62.

(14) *Alianza Co. Ltd v. Bell* (1905) 1 K.B. 184.

(15) *Inland Revenue Commissioners v. Lysaght* (1928) A.C. 234; 13 T.C. 511.

(16) *Re Nottingham General Cemetery Co.* (1955) 2 All E.R. 502.

(17) *London Cemetery Co. v. Cunday* (1953) 2 All E.R. 257.

(18) *Alabama Coal, Iron, Land & Colonization Co. v. Mylam* 11 T.C. 232.

COURT OF APPEAL.

C. H. Withers-Payne for the appellants.

G. S. Hill (Crown Counsel) for the respondent.

Whitton J. : — This is an appeal from a judgment of the Chief Justice setting aside a decision of the Board of Review and restoring certain assessments of the Comptroller made in respect of a company the A.....B.....Ltd.

The appellant company was incorporated in Singapore in 1934 and until the Japanese war carried on rubber planting on estates in Singapore and in Johore. During the war the Japanese felled about 270 acres of rubber trees on the Singapore estate. After the liberation it was considered that, in view of the very high cost of replanting and of the fact that the felled area was one of the least fertile portions of the company's lands, it would no longer be profitable to use the area for rubber-growing. Eventually the directors decided to use part of it as a cemetery. On 24th June 1947 they obtained a licence to use it for this purpose. In the first instance an acre was set aside for this use. An approach road was made and certain buildings i.e. a temple, a tiffin shed and a caretaker's quarters were erected at a total cost of approximately $30,000. One

of the company's staff was appointed as caretaker to look after the land and buildings and to show the site to prospective purchasers. The first plot was sold about July 1948. In 1952 a further nine acres were added to the area made available for burial purposes. In connection with this enterprise the appellants opened a Cemetery Account in their books. This account was debited with an estimated figure for the value of the burial ground area, with the cost of construction of road and buildings, and with expenses of maintenance. It was credited with the proceeds of sales of burial plots. The appellants state that they have always regarded these receipts are representing the proceeds of realisation of capital assets, and have therefore taken them to Capital and not to Revenue account. The Comptroller of Income Tax took a different view, however, and by three notices of assessment all dated 7th April 1954, following correspondence in the course of which he stated, "I propose to make assessments on the profits from the business of sale of burial plots," assessed the appellants in this connection in the sums of $11,355, $5,854, $25,656 for the years of assessment 1951, 1952, 1953 respectively. On appeal the Board of Review held that this income was not chargeable to tax, but, as already stated, the Board's decision was subsequently reversed.

The Board's decision resulted from their reaching the conclusion that sales of a right of burial in the circumstances of this case were in fact sales of a capital asset. Although it was not made a specific ground of appeal that the Chief Justice was wrong in holding it was open to him to reverse this finding it was strongly urged upon us on behalf of the appellants that this was a finding of fact which an appellate Court was not empowered to upset. It is necessary, therefore, in the first place to consider the precise scope of appeals under the Ordinance to the High Court from the Board. Section 81 of the Ordinance deals with the matter. (Since these proceedings started a new Edition of the Laws of the Colony has come into force and some sections of the Income Tax Ordinance have been renumbered, but the old numbers are given in brackets where this has occurred). The material portion of section 81 for the present point is sub-section (2) which reads :—

> "In any case in which the amount of tax payable, as determined by the Board (excluding the amount of any costs awarded) exceeds two hundred dollars, the appellant or the Comptroller may appeal to the High Court from the decision of the Board upon any question of law or of mixed law and fact".

Provision also exists, under section 82, for the Board to state a case on a question of law for the opinion of the High Court. It is important to bear in mind, in view of the English cases cited to us, that while by virtue of section 149 of the Income Tax Act, 1918, a similar provision exists in the United Kingdom for stating a case for the opinion of the High Court there is no right of appeal corresponding to that contained in section 81 of the local Ordinance.

In considering the present case in relation to section 81 I think it is true to say the crucial finding of the Board was that the company in issuing licenses for burial purposes was not carrying on a trade or business within the meaning of section 10(1)(a) of the Ordinance, a finding which followed from their view that sales of a right of burial was in the circumstances sales of a capital asset. In my opinion that finding involved a question of mixed law and fact. I would add that in forming this opinion I have appreciated that, as study of English cases, and in particular of the recent case of *Edwards v. Bairstow & Harrison*[1] shows, what constitutes a question of mixed law and fact is a matter which does not lend itself to easy definition. It would seem, however, that as far as reaching a finding on such questions as whether for the purposes of Income Tax legislation a trade is being carried on is concerned it is generally conceded that there is an element of law involved. In *Edwards v. Bairstow* (p. 225) Viscount Simonds said :—

> "To say that a transaction is or is not an adventure in the nature of trade is to say that it has or has not the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made. It is a question of law what is murder: a jury finding as a fact that murder has been committed has been directed on the law and acts under that direction. The Commissioners making an inference of fact that a transaction is or is not an adventure in the nature of trade are assumed to be similarly directed, and their finding thus becomes an inference of fact".

This approach to the matter may suggest the conclusion that the Board's finding in the present case was one of fact alone. But I consider that the only convincing interpretation of the local legislature's provision for appeals on questions of "mixed law and fact" in addition to questions of law is that they intended such provision to apply to cases like this where some knowledge and application of law to the primary facts was essential before the Board could hope to proceed on the correct lines in coming to their decision; even if it is conceded such expression of the legislature's intention is open to criticism on the reasoning exemplified by the passage I have quoted from the judgment of Viscount Simonds.

Turning to the grounds of appeal, it is convenient first to deal with the finding of the learned Chief Justice that the disposal of the burial rights was not a realisation of capital assets. The learned Chief Justice posed the question involved in the following terms :—

"If there is an outright sale of the burial plot so as to transfer the title in the land itself from the respondents to the buyer, then the transaction may properly be said to be realisation of an asset; if, on the other hand, it is a mere licence to use the land for burial purposes, the ownership of the land itself remaining unchanged, it would not be a correct use of language, in my view, to say that the respondents were realising an asset."

Now, as the Chief Justice proceeded to point out, the only document which comes into existence when the appellant company dispose of a burial plot is a receipt in the following form :—

A . . . . B . . . . LTD.

Received from .....
the sum of Dollars Fifteen ($15/-) in payment of one lot of burial land 10 ft. long by 5 ft. wide at Block ..... Lot No. ..... on our land at Jurong. The burial is subject to the Government's regulations and bye-laws for the time being in force.

Dated this ..... day of ..... 19.....

For A.... B.... Ltd.

.....
Secretary.

There was also oral evidence that the company had a caretaker who showed prospective purchasers available land and after purchase accepted payment for plots on behalf of the Company for a fixed and final price depending on size and situation. The Board were not prepared to find on this evidence that each plot was in fact sold, but they took the view that "the sale of a right of burial has the effect as between the Company and the purchaser of prohibiting the Company from ever making use of the land as long as the Government permits the land to be used as a cemetery, and to this extent the Board felt that such sale was in fact the sale of a capital asset". The learned Chief Justice agreed with the Board's finding there was no outright sale of the land, but did not accept the reasoning by which they held these transactions constituted sales of a capital asset.

It was submitted to this Court on behalf of the appellants that the document reproduced above contained a contract of sale. In my opinion it is clearly a receipt and nothing but a receipt. I think, moreover, that the only contracts entered into in connection with these transactions were oral ones between purchasers and the caretaker as agent of the appellant Company. On this submission rested the appellant's only apparent hope of establishing outright sale of the land, and, as I consider it cannot succeed, I respectfully agree with the learned Chief Justice's conclusion no outright sales occurred. In my opinion these transactions passed nothing more than the grant of a licence. It was also suggested that the grant of a right of sepulture (even in perpetuity) amounts to outright sale of the land concerned, but I do not think *The Queen v. The Inhabitants of St. Mary Abbot's Kensington*[2] cited in this connection is authority for that proposition.

I now turn to the contention of the Board that the sale of burial rights was the sale of a capital asset because the appellants were deprived of the use of the land as long as Government permitted it to be used as a cemetery. Two minor preliminary observations may be apposite in this connection. In the first place it would appear that in practice the period for which the land might be permitted to be used as a cemetery rested with the appellants, and not with Government whose licence is admittedly necessary as long as burials continue, but who cannot compel the appellants to provide any more ground that they wish for this purpose. Secondly it is common knowledge, although the point was not mentioned during the hearing of the appeal, that within the past ten or fifteen years the site of at least two disused Chinese cemeteries in Singapore have been used afresh, one for extensions to the Civil General Hospital and the other for business premises. Should a similar situation arise in, say, fifty years in respect of the area with which this case is concerned it can hardly now in 1957 be firmly predicted the appellants would have no proprietary interest in the lands. The Board considered that two cases, *Cooksey & Bibby v. Rednall*[3] and *Harvey v. Caulcott*[4] were "the nearest cases to the present" and "somewhat similar". But it is apparent at this stage that in the Board's opinion these two cases provided authority for their view that these plots were a capital asset because the appellants had been deprived indefinitely of the use of them became merged with their consideration of the ultimate issue whether the activities of the appellant Company which led to these proceedings constituted the carrying on by them of a trade or business within the meaning of section 10(1)(a) of the Ordinance. In *Cooksey & Bibby v. Rednall*[3] it was held in the case of purchasers of a farm who at the date of purchase had formed no intention of resale but subsequently resold that the profit from such resale was a capital profit. The brief facts in *Harvey v. Caulcott*[4] were as follows. H, a builder, obtained in 1927 a leasehold site upon which he built a number of shops. He sub-let two to his wife as his nominee and these were transferred from his business to his private accounts. These shops were sold at a profit in 1946 and 1948. In 1939 H. bought a house for his foreman to live in; this also was sold at a profit in 1948. It was held that profits arising in these circumstances arose on the realisation of investments and were not assessable to Income Tax. The link in the eyes of the Board between these two cases and the present one was that in all three the land was originally acquired for one purpose and after producing income for years sold for another, and as in the English cases the sales were held to be realisation of capital assets it seemed the same reasoning would apply to the

sales of A....B.... Estates. It was contended for the Crown that there at least five grounds on which these two English cases were distinguishable from the present one: (1) They were concerned with individuals; not a trading company; (2) they dealt with single assets, bought and sold as a single assets; (3) in them there was no evidence of change of form or alteration in the asset to make it saleable; (4) in them, or at any rate in *Cooksey & Bibby*[3], there was only one sale; (5) they did not involve the question of a company's intention. In my view none of these points affect the validity of the comparison drawn by the Board, but they might have made the comparison clearer by adding that in all three cases the land was originally contemplated as a capital investment and was sold through a subsequent change of intention. Another case cited in support of the Board's view was *Tebrau (Johore) Rubber Syndicate Ltd. v. Farmer*[5]. The facts as set out in the head note are as follows:—

"A company was formed with the object of acquiring estates in the Malay Peninsula and developing them by planting and cultivating rubber trees. Power was taken in the Memorandum of Association to sell the property and such a sale was contemplated in the prospectus issued at the inception of the Company. Two estates were purchased, but the original capital being insufficient to develop them the whole of the undertaking was sold to a second company for a consideration (mainly in shares of the second company) in excess of the capital extended. At the date of the sale a considerable acreage had been planted, but no rubber had yet been produced or sold".

It was held that the profit on the sale was not a profit assessable to Income Tax, but was an appreciation of capital. It is noteworthy that the Memorandum of Association of the appellant Company contains provision for sale of the undertaking's property. It was contended on behalf of the Crown that the *Tebrau case* was not in point as it involved a simple sale, but to my mind the material point as far as determining whether a piece of land was a capital asset, as far as this series of cases goes, is not whether the land has been disposed of in one lot at one time or in several lots at various times, but is what was the intention of the purchaser at the date of acquisition. To quote the judgment of Lord Salvesen in the *Tebrau case*[5]:—

"I am unable to distinguish the position of the Appellants from that of a person who acquires a property by way of investment and who realises it afterwards at a profit. It is well settled that in such a case the profit is not part of the person's annual income liable to be assessed for income tax but results from appreciation of his capital".

It would seem then that these cases provide considerable support for the Board's view as far as the question of intention of the appellant Company is relevant, but it appears to me the parallel between these cases and the present one breaks down when one comes to the manner of the disposal of the property. In the two English cases and in the *Tebrau case* there were outright sales of the land or shops in question. In the present case on the view of the matter I take there were no outright sales and what the purchasers got was merely a licence to inter in consideration for the payment they made. The Board did not, as I have already had occasion to mention, think there had been outright sales, but considered the practical effects of the actual transactions which occurred were so similar to what would have followed from outright sales that they should be treated as sales of a capital asset. To my mind this reasoning cannot be justified. I appreciate that on general grounds of justice there is a good deal to be said for it, but I do not think the distinction between an outright sale and something which falls short of it is simply academic, and, as I hope I have made clear earlier, it is possible that at some time in the future, even though the somewhat remote future, the appellant Company may be held to have a material interest in the land in question. For these reasons I do not think the Board was correct in concluding there had been a sale of capital assets.

I now turn to consider the present case in relation to the so-called cemetery cases, and in particular the case of *Edinburgh Southern Cemetery Co. v. Kinmont*[6].

The short facts of the *Edinburgh case* are as follows. The Edinburgh Southern Cemetery Co. was an unincorporated joint stock company formed with the object of "providing accommodation for the interment of the dead for the city of Edinburgh and its neighbourhood". The sort of right parties purchasing rights from the company acquired was set out in the 18th article of the contract, which read as follows:—

"That so soon as plans shall be agreed upon by the directors for laying out the ground acquired for the purpose of a cemetery, it shall be in the power of the directors to sell and to dispose of the use of pieces of ground for burial — places, tombs, or graves therein to any person or persons who may desire to purchase the same at such prices as the directors may think proper to fix. and that either in perpetuity or with the exclusive use of burial or interment therein for a limited period, and also to grant the privilege of enclosing the same or erecting any monument or tablet therein in memory either of parties deceased whose remains are interred therein or others".

It was held that the company was assessable for income tax in respect of receipts for *inter alia,* grounds sold for burial purposes. Counsel for the appellants sought to distinguish the present case on numerous grounds, but I think his arguments really boil down to two main contentions: firstly that on the correct interpretation of the income tax legislation involved the assessment in the *Edinburgh case* is not an authority for an assessment in the present case under section 10(1)(a) of our Ordinance; secondly that the facts are so different the earlier case has no application.

As to the first point it is true that the assessment in the *Edinburgh case* was made under the 3rd Rule

of No. III Schedule A and so, strictly speaking, it cannot be said the case was a decision to the effect the Cemetery Company was carrying on a trade or business, but by the Finance Act of 1926 concerns within No. III of Schedule A were transferred from that Schedule to Case 1 of Schedule D, and, as is stated in a passage at p. 10 of volume 2 of *Simon's* Income Tax referred to by the learned Chief Justice, "if a revenue is derived from selling grave spaces in a cemetery the resulting profit is assessable under Case 1 of Schedule D whether or not the seller undertook to maintain the graves". The second contention of the appellants to my mind presents more difficulty, but I think the issue itself is fairly clear, and that it is whether assuming their receipts from burial rights *prima facie* constitute "gains or profits from any trade", and in my opinion they do having regard to the facts of the legislation I have just referred to as well as to the general effect of such cases as the *Edinburgh case*[6], *Portobello Town Council v. Sulley*[7] and *Paddington Burial Board v. Commissioners of Inland Revenue*[8]. The situation is altered by the previous history of the A...B... lands. In my opinion there is nothing in the *Edinburgh* and other "cemetery" cases which affects the Board's view based on *Cooksey & Bibby v. Rednall*[3] and *Harvey v. Caulcott*[4] that the disposal of the burial plots by the appellant Company was a realisation of capital assets, but as indicated above I consider these two English cases do not come close enough to the present one to justify their being regarded as authoritative on this point.

It was submitted on behalf of the Crown that even if the Court formed the view there was a disposal of capital assets to the purchasers of grave spaces this did not mean the Company was not carrying on a trade; and that, even if the Company was disposing of capital assets, it was doing so in a manner which amounted to the carrying on of a trade. In considering this submission there are certain propositions on the subject of trading which I think may be regarded as settled. In the first place as stated in *Simon's* Income Tax vol. 2 at page 28 as follows: "the mere realisation of assets does not constitute trading. It depends entirely on the operations involved in the realisation whether trading will be held to have been carried on". Secondly to constitute trade it is not necessary to have a regular business of buying and selling (*vide Smith Barry v. Cordy*[9]). Thirdly to constitute trade it is immaterial that the activity in question is not the main trade of the company (*vide Gayzer Irvine & Co. v. C.I.R.*[10]). Of the cases cited to us on this aspect of the matter one of the most apposite to my mind is *Thew v. South West Africa Co. Ltd.*[11]. The brief facts were as follows. The Company was incorporated in England with the primary object of developing and turning to account certain concessions in German South West Africa. Among its powers was the right to turn the land granted to it to any account it might think most beneficial for its interests. From time to time the Company made sales of land to settlers and considerable tracts were also sold to other companies. The proceeds of the land sales were always carried to capital account, but the profit made on the sale of shares received from one of the companies in consideration of land transferred to it was distributed by way of dividend. It was held that any profits derived by the Company from sales of land must be taken into account in computing for Income Tax purposes the profits arising from the trade, adventure or concern in the nature of a trade exercised by the Company. Rowlatt J. in his judgment said:—

> "In this case the question is whether profits which can be found in the prices realised for land sold by this Company are to be included in their profits and gains for Income Tax purposes. That depends upon whether the profits to be found in such sales are part of the profits of a trade or concern in the nature of a trade carried on by the Company.
>
> For the present purpose, that is to say, for the purpose of ascertaining whether profits made upon a sale of an article are taxable profits, I think it is sufficiently accurate to say that it depends upon whether the article was acquired for the purposes of trade or not. In the case of a landowner who sells his land, or in the case of a man with valuable possessions who sells his books or pictures or plate or wine or what not, I take it that nobody dreams of taxing him upon the enhanced value which he may make when he sells these articles as compared with what he bought them for or what they were worth at the beginning of the year, if he is merely selling his possessions which he does not hold as a trader or with the view of a trader at all."

Now it is true that in that case the Commissioners found as a fact the gradual sale of a large part of the land was contemplated from the first, something which cannot be said to be a feature of our case notwithstanding the power to sell contained in the Memorandum of Association. It seems to me, however, that it is, in the final analysis, to the circumstances of the sale one must look to decide whether in any particular case there has been trading, a view for which I think support may be found in the judgment of Pollock M.R. in *Thew's case*[11]. Presumably had the appellant Company disposed of to a single party by a single transaction for the same purpose all the land they have now sold in lots there would be no suggestion any question of trading arose. As Cotton L.J. said in *Erichsen v. Last*[12] (at 420): "In my opinion when a person habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profit; he carries on a trade or business". Now it is obvious that in many lines of trading use must be made of capital assets. The difficulty in a case such as this arises, as I see the matter, when the particular use may

involve the dissipation of capital assets. But if the use is habitual and is capable of producing profit it seems to me there is no ground for holding it is any the less trading because the capital assets may be lost in the process. In other words it is income in respect of gains and profits from trading that is taxable irrespective of how that income has come about, though subject, of course, to statutory exemptions, and as I see the question it is possible for the sales of capital assets to be taxable, not as such, but because the circumstances of the sale involve trading. If these views are accepted we have, I consider, at this stage reached a point where the present case is distinguishable on a second ground from both *Cooksey & Bibby v. Rednall*[3] and *Harvey v. Caulcott*[4]. In both these cases the transactions were, I suggest, on the face of them, consistent equally with the realisation of capital assets or with trading, and it was the absence of proof of any intention originally to sell, and therefore of any intention to trade, which turned the scales in favour of the subject. But in our case it seems to me the general set-up for the disposal of these lots of land, including such amenities as the provision of the temple, the tiffin shed and the approach road, as well as the fact the enterprise continued over a number of years, and may still be active for all I know, all point clearly to one conclusion; namely that the Company were trading in land lots for burial purposes, and if this is the right view then it would seem to follow the Company's intention at the date it purchased the land is for present purposes irrelevant. I would add that I do not think either the fact the services provided were not on such an extensive scale as regular cemetery company makes available or any possibility the services actually rendered constituted an *"ultra vires"* activity on the part of the appellants can make any difference to this conclusion.

Before leaving this part of the case I would refer briefly to the grounds on which the Board reached a contrary conclusion. In the first place they appear to have thought that because the appellants decided this was the most profitable way of disposing of a barren portion of their lands the presumption, although they did not actually use that term, was the transactions were realisations of capital assets. Then they went on to say "The Company employed a caretaker at a very small salary but he was not employed to manage the graveyard for the company. He simply was a collector of fees to be paid for licences". (At this point I would observe *en passant* that while I do not think there is before us evidence as to the precise amount of the fees collected over the three years with which we are concerned it would appear they must have been considerable in view of the Comptroller's proposed assessments). Finally, as indicated earlier, the Board apparently attached considerable weight to the fact the land was sold as the result of the owners finding it no longer suitable for the purpose for which they had bought it. These reasons are not in my opinion adequate to justify in the face of the other material before them the Board's finding there was no evidence the Company was carrying on any trade or business, whether one applies the *dictum* of Cotton L.J. I have quoted or any other legal authority, and, although this was a finding of fact, I am of the view that it can only have arisen from the Board misdirecting itself as to what in law constitutes "trade" within the meaning of section 10 of the Ordinance; and that it is, consequently, open to an Appellate Court to set aside the finding.

I now turn to the second part of the Appeal. In substance it amounted to the contention that, if the appellants were held to have been carrying on a trade in selling burial lots, they are entitled to deduct the market cost of the purchase of the land, and for that purpose December 31st 1947 would be the material date. As the learned Chief Justice observed in his judgment, the Comptroller concedes there was a certain equity in the appellants' claim to deduct the capital cost of the land from the receipts obtained from the sale of burial rights, but contends that on the law as it stands there is no authority to make such a deduction. To ascertain what deductions are allowed one must look to section 14 of the Ordinance and it can scarcely be suggested this case falls within any of the categories enumerated therein. On the other hand I think counsel for the respondents goes too far in contending that it falls within two of the provisions of section 15 which lays down matters in respect of which deductions are not allowed. On the view of the case which appears to me correct I think it is true to say this part of the appellants' income arose from the employment of a capital asset in the exercise of trade. If this view is correct there would appear to be authority against allowing deductions in the *Edinburgh case*[6], as it was there held that the company could not deduct, in computing its profits, the estimated cost price of each grave space sold, since such a deduction was in respect of the exhaustion of a capital asset. This position has been altered in the United Kingdom in favour of the taxpayer by section 22 of the Finance Act 1954, but no corresponding provision has so far been enacted in the Colony. Since in the *Edinburgh case*[6], where the land was specifically acquired in the first instance to deal in burial lots, there was held to be exhaustion of capital assets it may seem that such a conclusion applies with equal, if not greater, force to our case. It would be

wrong, however, to reach a final opinion on this matter without due consideration of the case of *British South Africa Company v. Commissioner of Income Tax*[13], which, apart from being a decision of the Privy Council and, therefore, binding on this Court so far as it has application, arises from the Income Tax Ordinance of Northern Rhodesia which is substantially similar to the local Ordinance — and, in fact in the case of the section corresponding to our 10(1)(a) is virtually identical — and which, moreover, bears some resemblance in its facts. The following portions of the headnote in particular appear to me relevant:—

". . . . The principle that where the income of a taxpayer is derived from the exhaustion of a capital asset no deduction can be allowed for the cost of that asset is excluded in cases where the articles sold is that which it was the business of the assessee to acquire and to sell. Further, it was immaterial that in dealing with its mineral rights the appellant company had retained an interest either by way of a possible reverter of the property or by a shareholding in a company to which it had made a special grant under the Mining Proclamation of 1912 — it was still realizing in the way that appeared most advantageous the assets which it was its business to acquire and realize."

The Privy Council while expressly not throwing any doubt on the validity of the principle under the English Acts to be found in such cases as *Alianza Co. Ltd. v. Bell*[14] that where the income of a taxpayer is derived from the exhaustion of a capital asset no deduction can be allowed for the cost of that asset, and while assuming that it might be applicable also under the income tax law of Northern Rhodesia, said it appeared to them that the principle was excluded as soon as the conclusion is reached that the article sold was one which it was the business of the company to acquire and to sell. The Privy Council proceeded to decide that the acquisition and realisation of mining rights, the matter from which the disputed assessments arose, was within the British South Africa Company's objects. So it seems to me in our case the matter must be determined by the answer to the question whether A..... B..... Ltd. in realising part of their land by selling it for burial lots were doing something which was part of their business in the sense of the term we are contemplating. It may be contended with some confidence that the sale of lots for burial purposes is something not generally associated with the activities of a rubber company, but examination of Clause 3(b) of the company's objects shows there is a wide latitude in the nature of the business activities the appellants may carry on, and, as I understand the Clause, it sanctions the carrying on of any trade or business which in the opinion of the Board "is calculated directly to enhance the value of or render profitable any of the Company's property or rights". It may be presumed that the Board considered the disposal of this particular part of their property in this manner would render it profitable, and, if the point is in any way material, the history of the land and of the transactions appears to confirm the soundness of that opinion. It is also to be observed the Company possesses the power, under Clause 3(r), to sell their land. As far as the mere selling is concerned I am, therefore, disposed to think the appellants are on good ground, but I see some difficulty in that when the Privy Council spoke of something "which it was the business of the company to acquire and sell" it seems reasonable to infer what was envisaged was something which in the normal course of events would become exhausted in the process between acquisition and sale; and accordingly I think it does not necessarily follow the principle would apply to land, a commodity which in the ordinary way would not fall within this description, and in fact in the present case does so only by reason of the particular use to which the appellants turned it. It is also important to note that the Privy Council in the case referred to regarded the acquisition and realisation of mining rights as taking a "leading place" in the company's objects, and from the particular passage in the judgment of Viscount Simon where this is stated I incline at the risk of stating the obvious to the view it was considered the declared objects of a company is a material factor in deciding what is its business. It can scarcely be said, however, that the business of the A..... B..... Ltd. is to deal in the disposal of lots of land for burial purposes. At most it is an entirely incidental business upon which they have embarked. To say in these circumstances that the principle affirmed in *British South Africa Company v. Commissioner of Income Tax*[13] operates in the present case would, in my opinion, not be an application of the principle but an extension of it. For these reasons I do not consider deductions can be made on the authority of that case.

It is contended in the final ground of appeal "that the right to deduct the said cost does not depend upon the existence of any specific statutory provision authorising it, but is inherent in the computation of the said trade or business for the purpose of the Income Tax Ordinance". This contention is probably correct within limits, and indeed I think it may be said that the *British South Africa Company case* shows that it is, but in my opinion this Court would not be justified in the absence of apposite authority in holding the right existed in any particular case — it does not seem to me there is some sort of elastic equity the Court is empowered to invoke in favour of the taxpayer. It is with some regret that I reach this conclusion as it is conceded by the Crown that if there had been a sale of the capital assets the appellants would be entitled to

a deduction, and while, as indicated earlier, there was not in my view a sale the practical effect of the transactions as far as the Company is concerned in the foreseeable future is obviously to all intents and purposes the same as if there had been outright sales. The fact that our Income Tax Ordinance makes particular provision for mines and minerals of a wasting nature goes some way I think to support the view deductions cannot be allowed in circumstances of this kind, and as far as the present case is concerned the further fact that in the United Kingdom it was apparently considered necessary to pass legislation to grant relief in respect of land used for cemeteries seems to me while I appreciate that differences exist between the two systems of income tax law, to add further support to the view.

For these reasons I am of the opinion this appeal must be dismissed with costs.

Buhagiar J. : — I have read the judgment prepared by my brother Whitton. I had come to the same result and I will set out briefly the reasons for the conclusion I reached.

The first point that arises in this appeal is whether the learned Chief Justice was right in interfering with the decision of the Board of Review established under the Income Tax Ordinance. The answer to this question depends on whether there was before the Board a question of law or mixed law and fact from which an appeal lies under section 81(2) of the Ordinance and on whether there was sufficient evidence before the Board to justify them in coming to the decision they did.

The question before the Board was whether the income derived from the granting of burial rights was "income in respect of gains or profits from a trade" and assessable to income tax. The Board decided that it was not on the ground that the appellants were not carrying on a trade or business. The decision of the Board involved findings of fact from which a conclusion could be drawn as to whether the transactions of the appellants amounted to "trade" within the meaning of the Ordinance. In their supplementary grounds of decision of the 11th May, 1955 they stated: "after due consideration of the facts and arguments submitted to them (the Board) find as a fact that the transactions in question are not a concern in the nature of a trade".

Since the decision of the House of Lords in *Inland Revenue Commissioners v. Lysaght*[15], it is, I think, an established principle in the sphere of income tax law that it is not always a question of law, whether, once all the facts are found, a case falls within the meaning of the statute. But in the present case, "trade" is not defined in the Ordinance; if it had been it might have been possible that the decision of what and what is not a "trade" might depend on findings of fact. It is, I think, clear, that the word "trade" is not used in its popular sense, *uti loquitur vulgus* and the number of English cases in which the meaning of this word was considered shows that the interpretation of this term is not without difficulties and in my opinion, involves a point of law.

In coming to their conclusion the Board had to consider various matters and particularly the effect of the grant by the appellants of rights of burial over their land.

It was urged on behalf of the appellants that when the appellant company gave out lots of land for burial purposes there was an outright sale of the land; counsel for the appellants relied on the document at p. 41 which, he submitted, contained all the elements for a contract for sale and therefore on payment of the $15 therein mentioned the agreement operated as an alienation by the appellants of their beneficial proprietary interest in the land. I do not see how that document can possibly be construed as a contract of sale; it is simply a receipt for $15 paid in consideration of certain rights being given to the grantee of burial rights.

The Board found that there was no sale of land but held that in view of the fact that while the land was being used as a burial ground the appellants could not make any use of it, the transaction was in fact a sale of capital asset. In so holding the Board, in my opinion, erred in law in that they failed to appreciate the legal nature of the transaction, that is, that although the appellant company were creating restrictions on the use by them of the land, they never lost the ownership thereof. It is not necessary to deal with the nature of the rights acquired by the grantees; there is no evidence to show whether an exclusive right of burial is acquired or whether the grant of such right is in perpetuity or for a limited period. It would seem, however, that the grantees were simply licensees. But whatever right is acquired by the grantee the appellants continued to have ownership over the land; this is illustrated by the facts in two English cases: *Re Nottingham General Cemetery Company*[16] and *London Cemetery Co. v. Cunday*[17]. I, therefore, agree with the learned Chief Justice in the Court below that the reasoning of the Board in concluding that there was a sale of capital assets was wrong. The Board's decision was not based on purely a question of fact, but on a misconception of the legal nature of the transactions of granting burial rights; an appeal therefore lies from the decision of the Board under section 81(2) of the Ordinance.

The second point is whether the learned Chief Justice was right in reviewing and upsetting the decision of the Board. It was argued on behalf of the appellants that if there was evidence on which the Board could come to the conclusion they did (and it was submitted that there was), then on appeal that decision could not be upset simply because the Court would have come to a different conclusion. This proposition is, I think, correct subject to the qualification that proper legal principles have been observed. In the present case the Board misdirected themselves on a point of law, i.e. the legal nature of the transactions of granting burial rights. Their decision flows directly from this misdirection and from the finding that the appellants were realising their assets; the Court had therefore jurisdiction over the conclusions of the Board and could review the matter and draw the right conclusion from the primary facts as found by them.

The next question is whether the learned Chief Justice was right in holding that the transactions of the appellants amounted to 'trade' and that the revenue derived from the grant of burial rights is assessable. In his judgment he referred to *Edinburgh Southern Cemetery Co. v. Kinmont (Surveyor of Taxes)*[6] and other cases and said: These cases show quite plainly that although questions may arise as to the deductions which are allowable in arriving at profits or as to the effect of applying profits in aid of the rates and matters of that kinds, there is no doubt at all that moneys received for the sale of rights of burial in cemeteries, either in perpetuity or for a limited period, are trade receipts and as such are assessable, subject to proper allowances, to income tax under the Income Tax Acts. The matter is summarised in *Simon's* Income Tax, Vol. II at page 101, where it is stated that "if revenue is derived from selling grave spaces in a cemetery, the resulting profit is assessable under Case 1 of Schedule D (which relates to profits derived from trade), whether or not the seller undertakes to maintain the graves."

On behalf of the appellants it was submitted before this Court that the *Edinburgh* line of cases differ in several important respects from the present case; counsel argued that any similarity there may be raises only a question of degree which is a question of pure fact; he referred for example to the name and object of the appellant company and the difference in the management of the appellant company and that of the company in the *Edinburgh case*. I do not consider that any of the matters on which it was attempted to distinguish the present case from the *Edinburgh case* affect the substance of the transactions as regards land in the present case; there is in the present case as in the *Edinburgh case* "revenue derived from selling grave spaces in a cemetery" and "the resulting profit is assessable, whether or not the seller undertakes to maintain them."

The next point to be considered is whether any deductions may be allowed against the revenues received from the grants of burial rights. On behalf of the appellants it was contended that if they were held to be carrying on a trade, they are entitled to deduct the market cost of the purchase of the land as on the 31st December, 1947. I do not think that as the law now stands (section 14 of the Ordinance is the relevant provision) there is any authority to make any such deduction. The present state of the Ordinance on this point is similar to the law in the United Kingdom before the passing of the Finance Act in 1954, an amendment made to nullify the effect of the decision in the *Edinburgh case;* until however the Ordinance is amended the principles in that case are applicable and no deduction can be made in respect of cost of land used as grave spaces.

In my opinion, therefore, the appeal must be dismissed with costs.

Tan Ah Tah J. : — The first point taken on behalf of the appellants in this appeal is that the conclusion reached by the Board of Review that the sale of burial rights over the plots of land in question amounted to a sale of a capital asset is one which cannot be disturbed by an appellate Court. It was contended by counsel for the appellants that if, from the facts placed before them, the Board drew an inference which could be drawn either way, an appellate Court should not intervene even though it might have reached a different conclusion. It is therefore necessary to consider the process by which the Board arrived at their finding. Having considered the documentary evidence in the case and the submissions made to them, the Board state their firm opinion that the plots of land were not sold. However, the Board go on to say that the sale of a right of burial has the effect between the appellants and the purchaser of prohibiting the appellants from making use of the land as long as the Government permits the land to be used as a cemetery and to this extent, to use the Board's own words, they felt that such sale was in fact a sale of a capital asset. Now it is clear from the case of *Edwards v. Bairstow*[1] that in considering a determination of fact by the Commissioners for the General Purposes of the Income Tax in the United Kingdom, if it should appear to an appellate Court that no person, if properly instructed in the law and acting judicially, could have reached that particular determination, the Court may proceed on the assumption that a misconception of law has been responsible for the determination. In the present case

the record shows that the Board took the view that the purchasers of burial rights were merely licensees. In their grounds of decision of the 9th September 1955, given after the matter had been twice remitted to them by the High Court for hearing on particular points, they describe the work of the caretaker who was employed by the appellants in the following words :—

> "The Company employed a caretaker at a very small salary but he was not employed to manage the graveyard for the Company. He was simply a collector of fees to be paid for licences. His income was derived from licensees who paid him to keep the graves tidy."

What the Board have done is therefore to express the opinion that the plots of land were not sold and to hold that the purchasers of burial rights were merely licensees, but almost in the same breath to say that the sale of burial rights was in fact a sale of a capital asset. In my opinion the Board were not justified in ignoring the distinction between the grant of a licence and an outright sale of land in this manner. It is clear to my mind that a misconception of law has been responsible for the conclusion reached by the Board. It follows that it is open to an appellate Court to substitute its own conclusion for that of the Board. The point taken by counsel for the appellant therefore fails.

I now turn to consider the form of receipt which was issued by the appellants to purchasers of burial rights. It was contended by counsel for the appellants that the receipt constituted an agreement for sale of the plot of land in question and that the purchaser was in a position to bring an action for specific performance requiring the appellants to execute a conveyance of the property in his favour. It is to be observed that the receipt itself speaks of a payment for "one lot of burial land . . . . . on our land." This is an indication that the appellants considered themselves to be the owners of the land in respect of which rights of burial were sold. Further, at the hearing before the Board of Review, the appellants' representative said that the "Company grants perpetual burial rights over the plots." The pertinent question may be asked why he should speak of perpetual burial rights when it is being suggested that the land has been sold outright to the purchaser. In my opinion, when the form of receipt is examined and the circumstances surrounding the transaction are taken into consideration, the conclusion is inescapable that the appellants never agreed to an outright sale of the burial plots. It is clear that the receipt does not constitute an agreement for sale of the land; it is nothing more than a receipt for the payment made by the purchaser, who, in consideration of such payment, is given certain rights of burial over the plot of land. In my judgment the true view of the position is that the appellants regarded themselves as the owners of the land at all material times but were willing to sell rights of burial over the plots of land, though not the land itself. It follows, therefore, that in carrying out these transactions the appellants were not selling capital assets.

The next question that arises for consideration is whether the activities engaged in by the appellants amounted to carrying on a trade. On this point it is relevant to observe that on obtaining a licence from the authorities to use the land as a burial ground, the appellants constructed thereon a temple, a tiffin shed and caretaker's quarters and an access road at a total cost of approximately $30,000. The first sale of burial rights took place in July 1948. From that time onwards the burial ground became increasingly popular and by the end of 1954 the total area set aside by the appellants for the purposes of a cemetery was 12 acres. Now in the case of *Erichsen v. Last*[12] Cotton L.J. said (at page 420) :—

> "In my opinion when a person habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business."

Still nearer to the point, and indeed directly on the point, is the passage, which I accept as an accurate statement of the law, in *Simon's* Income Tax Vol. II paragraph 115 at page 101 :—

> "If a revenue is derived from selling grave spaces in a cemetery the resulting profit is assessable under Case I of Schedule D (which relates to profits derived from trade), whether or not the seller undertook to maintain the graves."

In the light of these statements of the law and having regard to the appellants' mode of business I am satisfied that the appellants were carrying on the trade of selling rights of burial in this cemetery. It follows, therefore, that the revenue derived by the appellants from the sale of such rights of burial constitutes income in respect of profits from a trade and such income is chargeable to income tax under section 10(1)(a) of the Income Tax Ordinance.

It was contended by counsel for the appellants that the case of *Edinburgh Southern Cemetery Co. v. Kinmont*[6] had no application to the present case because there the company was formed with the object of carrying on the business of a cemetery company while in the present case the company was formed with the object of carrying on the business of rubber planters. There are various cases in the reports which show that although a company changes its original intention in the course of the years and embarks on a different enterprise, it may still be held, in engaging in the new enterprise, to be carrying on a trade if the facts warrant such a finding. One of these cases is the *Alabama Coal, Iron, Land and Colonization Co. v. Mylam*[18]. In my opinion a change of intention is not

necessarily relevant when this question is being considered. What is most relevant is the mode in which the company conducts its affairs after the change of intention has taken place; if its course of business after such a change demonstrates that it is carrying on a trade the Court must of necessity reach the conclusion that it is in fact carrying on a trade. In my opinion none of the differences which are said to exist between *Edinburgh Southern Cemetery Co. v. Kinmont*[6] and the present case are of any consequence so far as the decision in this appeal is concerned. I regard the *Edinburgh Southern Cemetery Co.'s case* as being a relevant authority in this case.

The last point which remains to be considered arises out of the proposition put by counsel for the appellants that if the appellants were held to be carrying on a trade they would be entitled to claim the market value of the land as a deduction from the income derived from the sale of burial rights. In support of this proposition counsel for the appellants cited, *inter alia*, the case of *British South Africa Co. v. Commissioner of Income Tax*[13]. It is to be observed that in that case an important part of the business of the appellant company was the acquisition of mining rights on terms which seemed most advantageous to the appellant company. In short, it was the business of the appellant company in that case to acquire and realize mining rights. Now the principle which is ordinarily applicable is to be found in such cases, decided under the English Income Tax Acts, as *Alianza Co., Ltd. v. Bell*[14] which establish that where the income of a taxpayer is derived from the exhaustion of a capital asset no deduction can be allowed for the cost of that asset. What was decided in *British South Africa Co. v. Commissioner of Income Tax*[13] was that this principle is excluded in cases where the article sold is that which it was the business of the taxpayer to acquire and to sell. Now it is clear that in the present case the appellants' business was not the acquisition of land for the purpose of selling it as burial plots. The appellants' business was that of rubber planters but because of the high cost of replanting and the infertile nature of the area in question they decided to use part of it as a cemetery. I have already stated my view that in their transactions concerning the land they only sold certain rights of burial over the plots of land but not the land itself. There is therefore a fundamental distinction between the facts of the present case and those in *British South Africa Co. v. Commissioner of Income Tax*[13]. In my opinion the decision in *British South Africa Co. v. Commissioner of Income Tax*[13] does not support the appellants' contention that deductions of the market value of the land should be allowed. On this point I have reached the conclusion that the principle which was applied in *Alianza Co., Ltd. v. Bell*[14] should also be applied in the present case.

It is clear that under section 14 of the Income Tax Ordinance the appellants are not entitled to any deductions in respect of the market value of the land. There is in fact no authority or power of any kind to allow such deductions and I am therefore compelled to reach the conclusion that the appellants' contention on this point also fails.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Drew & Napier.*

ORIENTAL BANK OF MALAYA v. RUBBER INDUSTRY (REPLANTING) BOARD

[C. A. (Thomson C.J., Abdul Hamid and Neal JJ.) March 1, 1957]

[K. L. — F.M. Civil Appeal No. 39 of 1956]

Bill of Exchange Ordinance, 1949, s. 82 — Meaning of "customer" — Cheque made payable "account payee only" — Cheque collected for wrong person — Whether drawer of cheque has cause of action — Whether bank which collects the cheque has been negligent — Rubber Industry (Replanting) Fund Ordinance, 1952.

Post Office — Position of, as agent.

In this case the respondents issued a cheque in favour of Kok Ann Rubber Estate in the sum of $14,730.89 and the cheque was marked "account payee only". In some way unknown to the respondents the cheque came into the possession of some unauthorised person. Subsequently one Lee Man Choi opened an account with the appellants in the name of Kok Ann Rubber Estate, of which he claimed to be the sole proprietor. The account was opened with the cheque for $14,730.89. The respondents claimed damages. At the trial, the learned trial Judge held: (i) in the circumstances of the case there had been no delivery of the cheque to the payee and therefore the plaintiffs-respondents remained the true owners and were entitled to maintain the action; (ii) Lee Man Choi was a customer of the defendant-appellant banker, and therefore the bank could claim the protection of section 82 of the Bills of Exchange Ordinance, 1949; (iii) the defendant-appellant bank had not discharged the onus of proving that they have acted without negligence and were therefore liable to the plaintiffs-respondents for damages for conversion of the cheque.

The defendants appealed and on appeal it was argued that the respondents had no cause of action in that, at the date of the conversion of the cheque they were not the true owners of the cheque, nor entitled to the immediate possession thereof.

Held: the respondents were entitled to maintain an action for conversion of the cheque.